

January 10, 2022

The Secretary  
Ontario Securities Commission  
20 Queen Street West, 22nd Floor  
Toronto, ON

**Sent via email:** Ontario Securities Commission; [comments@osc.gov.on.ca](mailto:comments@osc.gov.on.ca)

**Re: OSC Staff Notice 33-753 - OSC Consultation on Tied Selling and other Anti-Competitive Practices in the Capital Markets**

Dear Secretary of the Ontario Securities Commission,

Scotiabank welcomes the opportunity to participate in the OSC's consultation on *Tied Selling and other Anti-Competitive Practices in the Capital Markets*. This issue was also raised by the Capital Markets Modernization Taskforce (the Taskforce) in their consultations last year and Scotiabank was actively engaged in discussions with both the Taskforce members and the Minister of Finance during that time. We have supported the government's efforts to drive increased efficiency in Ontario's capital markets however, the government should not be limiting competition and choice. Proposals from the Taskforce would significantly interfere with fair and efficient market-oriented decision-making by issuers in Canada, impair their access to and cost of capital, and increase red-tape in an attempt to tilt the playing field.

Scotiabank has built a legacy of commitment to our clients around the world. Across the Global Banking and Markets division, we continue to evolve our business to provide comprehensive, timely, and relevant service. We take pride in the relationships we build with our clients and the best-in-class service offering we provide. Our clients can access full service including advisory, financing and market commentary, and risk management for every stage of their business' life cycle.

With prospectus volumes increasing approximately 30% year-over-year and expected to grow further in 2022<sup>1</sup>, capital markets in Ontario remain vibrant and competitive. Additionally, over the past decade alternative capital providers such as private equity investors, venture capital investors and pension funds, have continued to expand the types of capital that they provide. These entities have become an important source of funding for companies of all sizes and throughout the capital structure, further increasing competition in the capital markets. Appendix A provides an overview of the growth of private capital in Canada over the last 20 years. We therefore see no evidence that suggests a lack of competition among investment dealers is impeding capital formation in any way. In the absence of such evidence,

---

<sup>1</sup> <https://www.osc.ca/en/news-events/news/osc-announces-temporary-changes-service-commitments>

there is no sound policy rationale for recommendations such as those provided by the Taskforce in their report.

### **Strong Relationships and Service Offering**

Products and services in capital markets are relationship driven and based on the exceptional service we provide as a bank, paired with many years of trusting relationships with our clients. Corporate clients in this space do not approach each of their capital markets transactions as unique events. Their capital markets activities are based on their evolving needs and their unique growth plans at every stage of their business. Their independent choice of financial partners is built upon years of trust and relationships with such firms. At Scotiabank, we stand behind our advice and execution and understand the importance of building trust with clients to earn their business.

Issuers currently benefit from a highly competitive market and have the choice to take the business where they see fit. The current regulatory environment allows for clients and issuers to choose freely who they trust to do business with, whether it be a bank-affiliated, foreign owned or independent dealer. Ensuring issuers have the ability to continue choosing which financial intermediary best suits their needs is of utmost importance when discussing Ontario's capital markets and should remain a focus of policymakers and regulators.

### **Current Regulatory Environment**

First and foremost, we object to the language and implication that has been used in the Taskforce's final report, OSC's consultation and in public discussion with the term "tied selling". Tied selling, or coercive actions to drive a client to obtain a service from a chartered bank or its affiliates, is prohibited by *the Bank Act*. The manner in which tied selling has been used during recent public discourse, including in the media, presupposes that bank-owned dealers are engaged in anti-competitive practices. This is not only untrue but damages the reputation of Canadian financial institutions.

We believe that each issuer is best positioned to determine whether it wishes to engage an independent dealer or other financial advisor to assist in assessing potential financing options or to provide other financial products and services. If the issuer chooses to engage a registered firm with whom (or with whose affiliate) it has an existing financial services relationship, that is a matter properly within the authority of the management team and the board of directors, rather than being dictated by a government or regulatory mandate.

Current and existing regulation surrounding tied selling is a sufficient and effective way to deal with any potential concerns outlined by the OSC's notice. Existing prohibitions and restrictions in the *Bank Act*, the *Competition Act* and/or National Instrument 31-103 (NI 31-103) are designed to ensure that tied selling does not occur within Canadian capital markets. Ensuring compliance with these requirements is a key responsibility for Canadian banks, and Scotiabank affirms its strong commitment in that regard as part of its regulatory compliance program.

While federal regulations prohibit tied selling, it is important to note that the same regulatory regime appreciates and permits a lender's ability to provide competitive packages. Section 11.8

of 31-103CP outlines that the comparable NI 31-103 restriction on tied selling is not intended to prohibit relationship pricing [described as the practice of industry participants offering financial incentives or advantages to certain clients] or other beneficial selling arrangements similar to relationship pricing.

The current regulatory environment promotes regulatory harmonization with Canada, as well as the compatibility of regulation globally. As a global financial institution headquartered in Canada, Scotiabank supports such consistency. Regulatory harmonization, especially related key regulatory principles and initiatives in the U.S. market, ensures Canadian firms can maintain competitiveness in global capital markets. This alignment fosters an increased understanding and interest in Canadian markets from U.S. and other foreign investors as well as enhanced access to the U.S. market for Canadian market participants through the Multijurisdictional Disclosure System. Scotiabank strongly supports this existing environment.

Finally, any exercise of regulatory authority should focus on proscribing anti-competitive practices (which restrictions are already in place). Recommendations as suggested by the Taskforce, especially as they relate to choices for issuers, are overly prescriptive and interventionist. Restricting the ability of a firm to make decisions based on their best interests, and instead based on rules created to tilt the playing field, will distort and interfere with market dynamics and outcomes and could impact business accountability and risk management.

### **Importance of Issuer Choice**

Scotiabank strongly believes that many of the recommendations in the Taskforce final report will restrict issuer choice and therefore, negatively impact capital raising and/or simply benefit foreign banks/dealers at the expense of all Canadian dealers.

In Ontario, issuers benefit from an already highly competitive market and should continue to have the ability to select their lenders, underwriters and/or financial advisors as they see fit, based on their own assessment of the most favourable structure, cost, service, capabilities, and client service relationships that they find beneficial. A dealer that is affiliated with a member of an issuer's lending syndicate may be well-positioned to offer (but not compel) the issuer an integrated package of advice and financing options. Potential advantages to the issuer could include relationship based financing terms, reduced execution risk (e.g., the issuer and its counterparties would have developed an integrated financing plan, taking into account capital-raising options), transaction confidentiality and access to specialized products, platforms and systems that a particular financial institution may be able to offer, including the network of the institution's sales and trading desk, and the ability to access institutional investors and retail buyers. With the ability to choose, issuers can decide which dealer to move forward with based on assessment of their products, services and ideas. It is up to lenders, underwriters, and/or financial advisors to earn the business through differentiation of ideas, knowledge and expertise which are the hallmarks of any competitive process in which they participate.

Understanding and evaluating the implications to restrict issuer choice is a key component of this discussion. Should the Taskforce's recommendations be implemented, the outcome could be detrimental to issuers, their shareholders and other stakeholders. Ensuring regulatory

compliance and capital requirements is a focus of major banks. Banks accept the risk and capital requirements associated with lending to the extent that doing so may yield other non-capital intensive, revenue generating opportunities. The proposed, overly prescriptive regulations prohibiting banks from offering a whole suite of products could result in unintended consequences including: a reduction in available loan capital with fewer lenders for companies seeking bank debt, as lenders may prefer non-capital intensive products; increased cost of capital for issuers through higher borrowing costs and increased fee-based transaction costs; more restrictive covenants and less flexibility for clients; and the potential outflow of highly skilled employment to other jurisdictions without the restriction of competition and choice

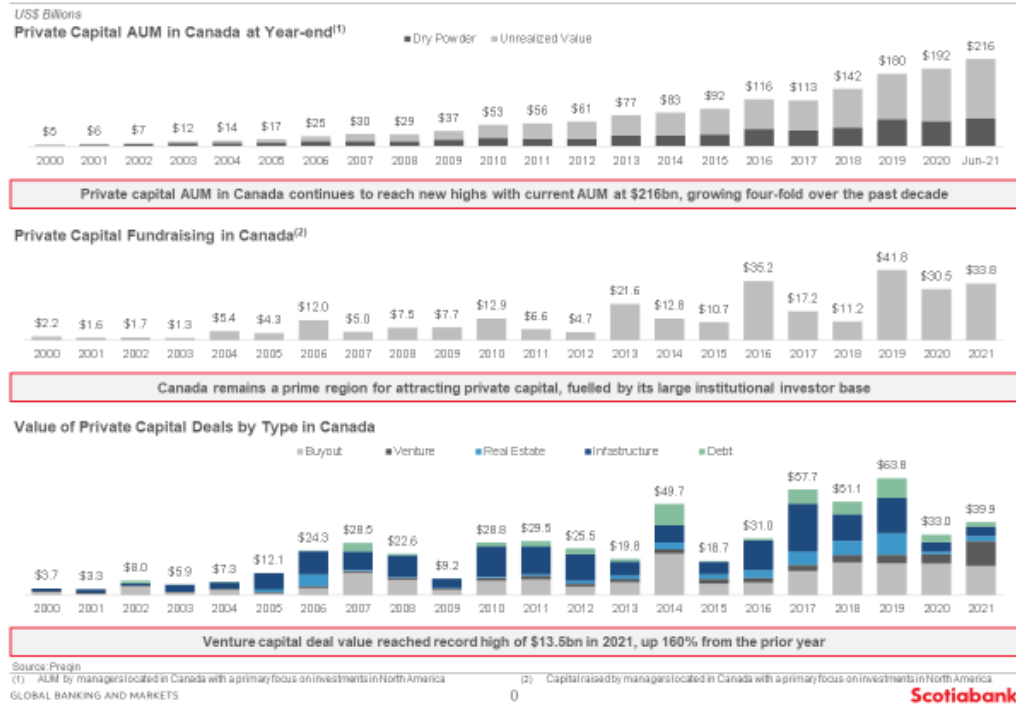
Additionally, the Taskforce's recommendations contained in the final report could result in the unintended consequence of benefitting foreign dealers at the expense of all Canadian dealers. Foreign dealers or their affiliates could identify in the proposed restrictions an opportunity to enter the Canadian market in a dealer/advisory capacity, which may undercut the proposal's presumed objective of fostering transaction activity for Canadian dealers not affiliated with Canadian banks. Canadian firms would be at a significant disadvantage compared to their U.S. bank-owned counterparts, who would not be subject to such limitations. To the extent that Canadian dealers are constrained in their ability to provide integrated, cost-effective financing solutions that are competitive with options offered by these foreign financing sources, there could be broader implications for the Canadian economy and economic strategy objectives toward diversification and supporting the "new economy".

Scotiabank shares the objective of the government in reforms that can contribute to the development and growth of both Ontario's and the country's economy and drive improved outcomes for market participants. We also strongly believe before any regulators or policy makers endorse or decide to move forward with policy recommendations on this subject, a comprehensive market study of both the perceived problems and the market impact of the proposed solutions should be conducted and published, with a view to serving customers, not independent dealers. Imposing requirements on issuers on who they retain for capital markets services would have immediate and significant adverse consequences for our capital markets. Such significant changes require serious and measured consideration.

.

## Appendix A- Growth of Private Capital in Canada

### Private Capital in Canada Overview



### Private Capital in Canada Overview (Cont.)

